SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 289

JOSE ARAMIS ALVAREZ, Individually, and in behalf of all those similarly situated,
Petitioner,

vs.

PAN-AMERICAN LIFE INSURANCE COMPANY,
Respondent.

AUGUSTIN GOYTISOLO RECIO, Individually, and in behalf of all those similarly situated,
Petitioner,

vs.

PAN-AMERICAN LIFE INSURANCE COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES A. DIXON
900 Dade Federal Building
Miami, Florida 33131
and
SAM DANIELS
1414 duPont Building
Miami, Florida 33131
Attorneys for Respondent.

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Petitioners pray that a writ of certiorari issue to

NOTE: The Recio and Alvarez cases were consolidated in the Court of Appeals below after separate records had been filed. "RR" is used herein for the Recio record and "AR" for the Alvarez record. Unless otherwise indicated, all emphasis is supplied.

review the judgment below of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 375 F.2d 992. This opinion affirms two separate orders of the United States District Court for the Southern District of Florida dismissing both the Recio and Alvarez cases for lack of jurisdiction (RR. 246, AR. 67).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The judgments of the Court of Appeals were entered on March 27, 1967.

STATUTE INVOLVED

Public Law 85-554[72 Stat. 415] provides in pertinent part:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, . . .
>
> * * *
>
> Sec. 2. That section 1332 of title 28 of the United States Code is amended to read as follows:
>
> '§1332. Diversity of citizenship; amount in controversy; costs

'(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

'(1) citizens of different States;

'(2) citizens of a State, and foreign states or citizens or subjects thereof; and

'(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

'(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

'(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has a principal place of business.

'(d) The word "States", as used in this sec-

tion, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.'"

QUESTION PRESENTED

Prior to the effective date of Amended Rule 23 of the Federal Rules of Civil Procedure, an insured having an individual claim of less than $10,000 against a mutual insurance company brought a class action against the insurer claiming to represent some five thousand separate policy holders. The action, among other things, sought an accounting, appointment of a receiver and imposition of a trust on all funds allegedly due all five thousand policy holders. The insured claimed the amount in controversy exceeded $10,000. The District Court, holding that the separate claims of separate policy holders could not be aggregated, dismissed the cause for lack of jurisdiction. On appeal and after Amended Rule 23 became effective, the Court of Appeals affirmed, reasoning that while the new rule was applicable, it did not change the principles regarding aggregation of claims of separate claimants to meet the jurisdictional amount requirement of 28 U.S.C. Section 1332. Assuming arguendo that Amended Rule 23 applies, was the Court of Appeals correct in holding that the separate claims could not be aggregated?

STATEMENT OF THE CASE

Each of the petitioners filed separate class actions in the District Court below. Each action was dismissed for want of jurisdiction over the subject matter. Both cases were consolidated in the Court of Appeals below

which affirmed both dismissals. The facts are slightly different in the two cases.

Alvarez Case

Petitioner Alvarez filed a "Class Suit to Impress a Trust and for Other Relief" in the district court below (AR. 1-15). The allegations of the complaint may be summarized as follows:

1. Petitioner is one of some five thousand Cuban nationals who purchased life insurance policies from the respondent Pan-American Life Insurance Company prior to October 24, 1960.

2. Petitioner Alvarez brings the suit "individually, and in behalf of all those similarly situated" (AR. 1) who are "defined as those individuals who are or were the owners of or beneficiaries of policies of insurance issued by the Defendant, and who are or were Cuban Nationals residing in Cuba at the time of issuance of such policies of insurance." (AR. 2).

3. The amount in controversy exceeds ten million dollars, (AR. 2) and "is a fund which belongs to the Plaintiff and other members of the class." (AR. 5).

4. Respondent has "arbitrarily cancelled" all the policies of the members of the class, converted the ten million dollars, and denied the class members "the right to have a voice in the

management and control of the Defendant, a mutual insurance company." (AR. 3-4).

5. The complaint closes with a request for the following relief:

"WHEREFORE, the Plaintiff sues for himself and those similarly situated for:

1. An accounting of all funds in the possession of the Defendant from October 24, 1960, to-date.

2. For an injunction requiring the Defendant to reestablish upon the books of the corporation the interest of the Plaintiffs and requiring the Defendant to honor all claims of the Plaintiffs and members of the class, to pay cash surrender values when requested, to grant loans when requested upon the security of the Plaintiffs' policies, to pay any perseverance bonuses, coupons, dividends, interest, that might be due to the Plaintiffs, to restore voting privileges to the Plaintiff class, and to accept payment of the premiums from the Plaintiff and the members of the class.

3. That the attorneys for the Plaintiffs be awarded an attorneys' fee as provided by law for the establishment of the plaintiffs' interest in the Defendant company.

4. Grant such other and further relief as the Court may deem appropriate." (AR. 5-6).

Attached as an exhibit to the complaint is a "specimen" policy (AR. 6-45), but the complaint is silent as to the terms and conditions of the policy issued to petitioner Alvarez himself. Respondent filed a Motion to Dismiss and Suggestion of Lack of Jurisdiction of Subject Matter (AR. 45), together with an affidavit of its Vice President that petitioner Alvarez's policy was issued:

> " . . . [O]n July 19, 1942 in the amount of $5,000.00. The policy was originally issued as a Dollar contract, however, in 1952 the Insured executed a Monetary Agreement in which it was mutually agreed with the Company that the latter would accept premium payments in Cuban currency in the Republic of Cuba, in lieu of United States Dollar premiums in the City of New Orleans, Louisiana. Furthermore, the Agreement expressly provides that all premiums, benefits and claims payable under the policy will be paid in the national currency of the Republic of Cuba, at the City of Havana, Cuba on the basis of one (1) Peso for each Dollar payable under the contract executed between the Insured and the Company. . . . " (AR. 47-48).

The affidavit goes on to make actuarial computations on the assumption that all events occurred to give the policy its maximum possible value (no one here actually knows what happened when Castro took over). These calculations show that in no event could the policy have been worth more than "Ps. 5,823.27" at the time suit was filed (AR. 49).

After hearing argument and considering the briefs of the parties filed below (AR. 54-64), the district court dismissed the case for want of jurisdiction over the subject matter (AR. 67).

Recio Case

Petitioner Recio filed a "Class Suit To Impress A Trust and for Other Relief" in the district court below (RR. 1-8). The allegations of the complaint may be summarized as follows:

1. Mr. Recio is one of some five thousand Cuban nationals who purchased life insurance policies from the defendant Pan-American Life Insurance Company prior to October 24, 1960. (RR. 2).

2. Mr. Recio brings the suit "for himself and those similarly situated in the class" (RR. 2) who are described as five thousand Cuban nationals who resided in Cuba and purchased contracts of insurance from the defendant prior to October 24, 1960 (RR. 1-12).

3. The amount in controversy exceeds the sum of $10,000.00 (RR. 2) which consists of:

> "... a fund of $6,201,143.16, a portion of which fund, by the very terms of their policies, belong to the Plaintiff and other members of the class in the proportion as defined in their respective contracts of insurance.

9. That on information and belief approximately 20 per cent of the said fund, to-wit: $1,240,228.63 is applicable to the payment of any perseverance bonuses due to the Plaintiff or the members of the class and as such belongs to and is the property of the Plaintiff and all members of the class and is to be held by the Defendant for their use and benefit." (RR. 6).

4. That plaintiff and the other members of the class became entitled to their "proportionate" share of the $1,240,228.63 in 1962, but defendant has refused to pay plaintiff or any other member of the class and has converted the fund to its own use.

5. The complaint closes with a request for the following relief:

"WHEREFORE, The Plaintiff sues for himself and those similarly situated in the class and prays as follows:

1. For the appointment of a receiver to take charge of said fund;

2. For an accounting as to the amount of said fund;

3. For an Order impressing a trust on the said $1,240,228.63 fund, or such other sum as the court may determine, after accounting, be proper;

4. For a judgment against the Defendant for any monies improperly paid or which have been converted to its own use;

5. That the attorneys for the Plaintiff be awarded as attorney's fees a proportionate part from all of the fund hereby sought to be created;

6. That the Court grant such other and further relief as it may deem appropriate." (RR. 7-8).

The policy which was issued to Mr. Recio in 1942, was in the face amount of One Thousand ($1,000.00) Dollars (RR. 59-73). The persistency bonus which can normally and reasonably be expected from such a bonus amounts to less than Five Hundred ($500.00) Dollars (RR. 23). However, in the instant petitioner's case:

> "In the case of policy number 368-510, Augustin Goytisolo Recio, the premiums were not paid to the end of the persistency bonus period, and the demand for cash surrender was made prior to the end of such period. Under these conditions, no persistency bonus payment is due according to the normal practice of the Company. Other policy holders in similar situations would similarly be denied payment." (RR. 18).

After hearing arguments and considering the briefs of the parties below (RR. 241-245), the district court dismissed the case for want of jurisdiction over the subject matter. (RR. 246).

Proceedings In The Court of Appeals

The Alvarez and Recio cases were consolidated in the Court of Appeals which wrote one opinion disposing of both cases. At 375 F.2d 993, the Court of Appeals stated its holding as follows:

> "We affirm. In so doing we conclude that new Rule 23, adopted July 1, 1966, is applicable to these cases. However, we hold further that this rule is of no avail to appellants as it does not abrogate the well settled principle that separate and distinct claims may not be aggregated to make the jurisdictional amount even in a class action."

REASONS FOR DENYING THE WRIT

1. The decision below is not in conflict with any decision of another court of appeals. Petitioners do not cite and our research does not disclose any conflicting decision from any court on the Amended Rule 23 — aggregation issue. The Amended Rules will unquestionably give rise to new decisions on new points of federal practice and procedure. Traditionally, this Court leaves initial determination of these issues to the lower federal courts until a conflict arises warranting resolution by this Court.

2. The decision below is correct and in probable accord with this Court's prior decisions. Since the inception of diversity jurisdiction in 1789 (almost a century and a half before any federal rules of civil procedure), Congress has imposed a jurisdictional amount require-

ment. 1 Stat. 73, 78. The ensuing years have produced countless federal decisions holding that separate claims of separate claimants cannot be aggregated for jurisdictional amount purposes. By 1916, this Court in PINEL v. PINEL, 240 U.S. 594, 596, stated the "settled rule" as follows:

> "The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount. . . . "

Under this "settled rule", aggregation of the claims of separate insureds having individual insurance contracts with a mutual insurer has never been permitted. E.g. TROUP v. McCART, (5th Cir.1956), 238 F.2d 289; ANDREWS v. EQUITABLE LIFE ASSUR. SOC., (7th Cir.1941), 124 F.2d 788; and EBERHARD v. NORTHWESTERN MUTUAL LIFE INS. CO., (6th Cir.1917), 241 F. 353.

A holding that the "settled rule" regarding aggregation for jurisdictional amount purposes has been changed by Amended Rule 23 would violate Amended Rule 82 which declares:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . . "

3. The decision below is in accord with the consistently manifest intent of Congress to limit rather than expand federal diversity jurisdiction.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

JAMES A. DIXON

JAMES A. DIXON
900 Dade Federal Building
Miami, Florida 33131

Sam Daniels

SAM DANIELS
1414 duPont Building
Miami, Florida 33131
Attorneys for Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, was mailed to the attorney for the Petitioners, JOSEPH A. McGOWAN, ESQUIRE, 823 City National Bank Building, Miami, Florida 33130, this 14th day of July, 1967.

JAMES A. DIXON